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IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:

David Alan Husted, Jr.
xxx-xx-0694
3422 Gold Candle Drive
Spring, TX 77388

Case No. 11-41903-R

Sally Irene Husted
xxx-xx-0889
232 Forest Meadow Drive
Gunter, TX 75058

Chapter 13

Debtors

DEBTORS' APPLICATION TO APPROVE
SETTLEMENT OF PERSONAL INJURY CLAIM
NUNC PRO TUNC

NOTICE

NO HEARING WILL BE CONDUCTED ON THIS APPLICATION UNLESS A WRITTEN OBJECTION IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AND SERVED UPON THE PARTY FILING THIS PLEADING WITHIN TWENTY-ONE (21) DAYS FROM DATE OF SERVICE UNLESS THE COURT SHORTENS OR EXTENDS THE TIME FOR FILING SUCH OBJECTION. IF NO OBJECTION IS TIMELY SERVED AND FILED, THIS PLEADING SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT. IF AN OBJECTION IS FILED AND SERVED IN A TIMELY MANNER, THE COURT WILL THEREAFTER SET A HEARING. IF YOU FAIL TO APPEAR AT THE HEARING, YOUR OBJECTION MAY BE STRICKEN. THE COURT RESERVES THE RIGHT TO SET A HEARING ON ANY MATTER.

TO THE HONORABLE UNITED STATES BANKRUPTCY COURT:

COME NOW David Alan Husted, Jr. and Sally Irene Husted, Debtors in the above-styled and numbered case (hereinafter collectively referred to as the "Debtors"), and file this *Debtors'*

Application to Approve Settlement of Personal Injury Claim Nunc Pro Tunc (the “Application”) by and through the undersigned attorney. By the Application, the Debtors request the entry of an order a) authorizing them to enter into an agreement with the Roman Catholic Church in the State of Hawaii, a/k/a The Roman Catholic Diocese of Honolulu, the Diocese of Buffalo, N.Y., Southern Tier Catholic School Archbishop Walsh Academy, Wausau Insurance Co., Nationwide Indemnity Company, Proprietors Insurance Company, Exchange Insurance Co., Selective Insurance Group, Inc. (hereinafter collectively referred to as the “Defendants”) settling and compromising any and all claims asserted against said parties nunc pro tunc; b) authorizing the Standing Chapter 13 Trustee herein to disburse funds as needed to pay all outstanding allowed creditor and administrative expense claims; and c) directing their special counsel, Ms. Michele M. Betti, to retain all additional settlement funds in her trust account pending approval of a fee application herein. In support of the Application, the Debtors would respectfully show the Court as follows:

I. JURISDICTION

1. The Court has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. §§1334 and 157. Pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O) the Application presents a core proceeding.

2. Venue in this Court is proper under 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein include section 105(a) of 11 U.S.C. §§101-1532 (the “Bankruptcy Code”) and Federal Rule of Bankruptcy Procedure 9019 and Local Rule of Bankruptcy Procedure 9019.

II. BACKGROUND

4. This bankruptcy case was commenced by the filing of a joint voluntary petition under Chapter 13 of the United States Bankruptcy Code on June 20, 2011 (the “Petition Date”).

5. Carey D. Ebert (the "Trustee") has been duly appointed to serve as the Standing Chapter 13 Trustee in the case and continues to serve in that capacity.

6. In 2012, subsequent to filing his bankruptcy petition, Debtor David Alan Husted, Jr. (hereinafter "David") discovered that he was entitled to sue to recover for certain injuries suffered as a child which he previously believed had been barred by the applicable statute of limitations governing such actions. More specifically, on April 24, 2012 the State Legislature of the State of Hawaii enacted HRS § 657-1.8. HRS § 657-1.8 provided a two-year window from the date of its enactment for all child abuse victims whose claims had been barred by prior operation of the statue of limitations to bring suit against their abusers. Following the discovery that he possessed the right to sue for recovery per the provisions of HRS § 657-1.8, David retained counsel to represent him, on a contingent fee basis, in pursuing such claim.

7. On April 22, 2014, a civil action styled *David Husted, Jr. vs. Roman Catholic Church in the State of Hawaii, A.K.A. the Roman Catholic Diocese of Honolulu; the Diocese of Buffalo, N.Y.; Southern Tier Catholic School Archbishop Walsh Academy; the Southdown Institute; James A. Spielman; and Doe Defendants 1-10* was commenced in the United States District Court for the District of Hawaii by Jared A. Washkowitz and Michele M. Betti, David's retained counsel. Said case was assigned cause number 1:14-cv-00192 by the clerk of the District Court. This case is hereinafter referenced as the "Federal District Court Case."

8. In June, 2014, the Debtors sought the permission of this Court to employ Ms. Betti and Mr. Washkowitz as special counsel to assist David in pursuing his claim. An Order approving the employment of said counsel was entered herein on July 1, 2014 [docket # 47].

9. With the assistance of the aforementioned special counsel a monetary settlement agreement was negotiated with the Defendants in the Federal District Court Case. Under the terms of the settlement One Million Five Hundred Thousand and 00/100 dollars

(\$1,500,000.00) is to be paid to Mr. Husted on behalf of The Diocese of Buffalo N.Y. and Southern Tier Catholic School Archbishop Walsh Academy. A further Twenty-Five Thousand and 00/100 dollars (\$25,000.00) is to be paid to Mr. Husted on behalf of the Roman Catholic Church in the State of Hawaii, A.K.A. the Roman Catholic Diocese of Honolulu. Such payments will be remitted in full and final satisfaction of any and all potential claims held against the Defendants by the Debtors. Such payments are hereinafter collectively referred to as the "Settlement Proceeds." A copy of the *Release and Indemnity Agreement* entered into by the parties and memorializing these terms is attached hereto as Exhibit "1."

10. Following the agreement of the parties the Federal District Court Case was dismissed on or about August 25, 2016.

11. Upon information and belief, the aforementioned Settlement Proceeds have been remitted by the Defendants to the Debtors' special counsel and have been held in Ms. Michele M. Betti's trust account.

12. The Debtors have agreed that, due to the nature of the recovery, David will retain one hundred percent of all net Settlement Proceeds remaining following payment of a) their Chapter 13 plan base balance; b) all costs and fees awarded to their special counsel, and c) all attorney's fees and costs awarded to their bankruptcy counsel in connection with the filing and prosecution of this Motion.

13. The affidavits of both David Alan Husted, Jr. and Sally Irene Husted in support of this Motion are attached hereto as Exhibit "2" and Exhibit "3" respectively.

14. Upon further information and belief, and after consultation with Ms. Betti and the Trustee, Ms. Betti has wired, or will be wiring, \$156,000.00 of the Settlement Proceeds to the Trustee for use in paying the Debtors' remaining Chapter 13 plan base balance and associated administrative costs.

15. Pursuant to the terms of the retainer agreement between the Debtor and his special counsel said counsel was to receive between 33.3% to 40% of the total recovery plus costs, fees and expenses incurred during the process of representation. As the total recovery was \$1,525,000.00, special counsel's attorney's fees may be as large as \$610,000.00.

16. To date, despite having been requested to do so, special counsel has not provided David with a statement setting forth attorney's fees due and owing. Nor has special counsel provided David with a statement detailing additional expenses incurred during the course of representation. As a result, the Debtors are unable to provide the Court with a detailed summary of fees, costs and expenses incurred by special counsel herein.

17. As noted above, an Order approving the employment of said counsel was entered herein on July 1, 2014 [docket # 47]. Per the terms of that Order, special counsel's fees are subject to review pursuant to Fed. R. Bankr. P. 2016(a) and LBR 2016.

III. RELIEF REQUESTED

18. Debtors seek the permission of this Court to enter into the settlement agreement described above. Debtors seek this permission on a nunc pro tunc basis.

19. Debtors further seek an order authorizing the Trustee to utilize the \$156,000.00 portion of the Settlement Proceeds being remitted to her by Ms. Betti to:

- a) pay all remaining allowed claims of creditors due and owing under the Debtors' Chapter 13 Plan;
- b) pay all statutory fees due and owing to the Trustee in connection with their Chapter 13 case pursuant to 28 U.S.C. §586(e)(1)(B); and
- c) pay any and all remaining administrative expense claims, including their bankruptcy counsel's attorney's fees and other costs incurred herein in the total sum of \$2,000.00, and as described and detailed in Exhibit "4" hereto.

20. Debtors further seek an order stating that the remaining Settlement Proceeds, in the total sum of \$1,369,000.00¹ shall be retained in trust by Ms. Michele M. Betti, pending approval of a fee application submitted pursuant to Federal Rule of Bankruptcy Procedure 2016(a) and Local Bankruptcy Rule 2016.

21. In accordance with the provisions of Local Rule 9019 this Application, and the supporting Affidavits, provide specific details regarding the proposed settlement agreement and contains an analysis of the relevant settlement factors.

IV. BASIS FOR RELIEF REQUESTED

22. Bankruptcy courts are empowered to approve a compromise settlement of a debtor's claim under Bankruptcy Rule 9019(a). Approval should only be given if the settlement is "fair and equitable and in the best interest of the estate." *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)* 68 F.3d 914, 917 (5th Cir. 1995), (citing *In re Jackson Brewing Co.*, 624 F.2d at 602). See also, *Matter of Cajun Elec. Power Co-op, Inc.*, 119 F.3d 349, 355 (5th Cir. 1997).

23. "In deciding whether a settlement of litigation is fair and equitable, a judge in bankruptcy must make a well-informed decision, 'comparing the terms of the compromise with the likely rewards of litigation.'" *Jackson Brewing Co.* at 602. Specifically, the Court must "evaluate and set forth in a comprehensible fashion:

- (1) The probability of success in the litigation, with due consideration for uncertainty in fact and law;
- (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (3) All other factors bearing on the wisdom of the compromise." *Id.*

¹ This figure represents the total Settlement Proceeds of \$1,525,000.00 less \$156,000.00 that will be remitted to the Standing Chapter 13 Trustee herein.

24. In order to comply with the first factor outlined above, it is not necessary for the Court “to conduct a mini trial to determine the probable outcome of any claims waived in the settlement.” Cajun Electric at 356. Rather, the Court “need only apprise [itself] of the relevant facts so that [it] can make an informed and intelligent decision.” *Id.*

25. Included under the third factor outlined above are two additional elements that should be considered by the Court. “First, the court should consider the best interests of the creditors, ‘with proper deference to their reasonable views.’” *Id.*, citing *Foster Mortgage Corp.* at 917. “Second, the court should consider ‘the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion. *Id.*

26. Although there is an ongoing dispute between David and Michele Betti regarding various aspects of special counsel’s representation, including Ms. Betti’s fees and costs incurred during the representation, in the judgment of the Debtors, and based upon the specific circumstances involved in this case, the proposed settlement satisfies the fair and equitable standard. The settlement satisfies said standard primarily because it is sufficient to generate a 100% dividend for all creditors holding allowed unsecured claims herein. Premises considered, the settlement is clearly in the best interest of the Debtors, as it will allow them to obtain their bankruptcy discharge, and of their bankruptcy estate, as it will allow full recovery by all creditors holding allowed claims therein. In arriving at this opinion, the Debtors and their counsel have taken into account the terms of the compromise and the likely rewards, and risks, of litigation.

27. Although there is an ongoing dispute between David and Michele Betti regarding various aspects of special counsel’s representation, including Ms. Betti’s fees and costs incurred during the representation, the Debtors believe that the settlement agreement was achieved as

a result of arms-length bargaining between counsel for the Debtors and counsel for the Defendants.

28. Nunc pro tunc relief of the type sought by the Debtors herein has been granted under similar circumstances by other bankruptcy courts in this state. *See, e.g., In re Bienz*, 2008 WL 2325626. *See, also In re Chaparro Martinez*, 293 B.R. 387 (Bankr.N.D.Tex. 2003), citing *In Re Hargis*, 887 F.2d 77 (5th Cir. 1989).

V. NOTICE

29. Notice of the filing of this Motion has been given to the Office of the United States Trustee, the Standing Chapter 13 Trustee, to Debtors' special counsel, and to all creditors and/or parties of interest listed below and upon the attached mailing matrix.

WHEREFORE, PREMISES CONSIDERED, the Debtors respectfully pray that they be authorized to enter into the settlement agreement, on a nunc pro tunc basis, and upon the terms detailed herein. Debtors further pray for the entry of an order directing the Trustee to disburse funds as detailed herein, and for an Order directing Ms. Betti to retain the remaining Settlement Proceeds in trust pending approval of her fee application. Debtors pray for such other relief and further relief, general or special, at law or in equity, to which they may be justly entitled.

Dated: November 28, 2016

/s/ Michael S. Mitchell

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that true and correct copies of the foregoing pleading and all attachments were served upon all parties listed below and upon all parties listed upon the attached mailing matrix in accordance with applicable rules of bankruptcy procedure on this 28th day of November, 2016. Where possible, service was made electronically via the Court's ECF noticing system or via facsimile transmission where a facsimile number is set forth below. Where such electronic service was not possible, service was made via regular first class mail.

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The preferred mailing address (p) above has been substituted for the following entity/entities as so specified
by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

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